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Seventieth session (second part)

Provisional summary record of the 3449th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 8 August 2018, at 3 p.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter VI. Protection of the atmosphere (*continued*) (A/CN.4/L.919 and A/CN.4/L.919/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter VI of its draft report contained in document A/CN.4/L.919/Add.1.

Commentary to draft guideline 1 (Use of terms)

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

The commentary to draft guideline 1 as a whole was adopted.

Commentary to draft guideline 2 (Scope of the guidelines)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murase (Special Rapporteur) said that paragraph (2) had been inserted to address concerns expressed during previous discussion of the commentary; on reflection, however, he felt it did not add anything to the text and should be deleted.

The Chair said he took it that the Commission agreed to that suggestion.

Paragraph (2) was deleted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

Mr. Tladi said that he would like the following sentences to be added at the end of paragraph (6), which referred to the understanding of the Commission that had been reached when the topic had been included in its programme of work at the sixty-fifth session in 2013: "It should be emphasized that the decision of the Commission not to address the concepts in paragraph 2 in no way reflects the Commission's view of the legal status of these concepts. Moreover, some members of the Commission expressed the view that the Commission ought to have addressed these concepts." Such an addition would reflect the usual practice of the Commission when divergent views were held on a text submitted for adoption on first reading.

Mr. Jalloh, expressing support for the thrust of Mr. Tladi's proposal, suggested that either the paragraph should be deleted or a single, simpler sentence should be added, to read: "This is without prejudice to the status of those principles under international law."

Sir Michael Wood said that he had no objection to adding the first sentence proposed by Mr. Tladi. Referring to "legal status", rather than just "status", as suggested by Mr. Jalloh, was preferable as it could be understood to include domestic law as well. The second sentence proposed by Mr. Tladi, however, was more problematic as it appeared to contradict the understanding of the Commission that was the focus of the paragraph.

Mr. Saboia said that he could accept either proposal; in view of Sir Michael Wood's comments, Mr. Jalloh's suggestion might be better.

Mr. Murphy said that he disagreed with that view, as the sentence proposed by Mr. Jalloh characterized everything listed in draft guideline 2 (2) as "principles of international law", which in his opinion was incorrect. With regard to Mr. Tladi's proposal, he agreed with the comments made by Sir Michael Wood. Alternative wording would be needed, in line with previous discussions of the Commission concerning how to reflect the fact that views within the Commission differed on certain issues.

Mr. Tladi said that it was normal practice for strongly held minority views to be reflected in the commentaries to draft texts, even when the members concerned had joined consensus on decisions with which they felt uncomfortable. Not to mention such views was potentially misleading. While Mr. Jalloh's proposal was in line with his own, it was less explanatory.

Mr. Murase (Special Rapporteur) said that, while it would have been preferable to address the issue on second reading rather than at the current stage, he appreciated Mr. Tladi's proposed addition and would support it. However, the basic problem with draft guideline 2 (2) was that it did not make sense because of the implied double negative in the wording "the present draft guidelines do not deal with, but are without prejudice to", as highlighted in discussions of the Sixth Committee.

Mr. Jalloh said that it was more appropriate for divergent views to be expressed and problems tackled when texts were submitted for adoption on first, rather than second, reading. He had disagreed with the understanding reached by the Commission in 2013 as it excluded relevant environmental principles from the topic of protection of the atmosphere. The concern expressed by Mr. Murphy might be addressed by altering Mr. Tladi's second proposed sentence to begin: "The view was expressed that …"

Sir Michael Wood said that he wished to place on record that the understanding reached by the Commission in 2013 had been fundamental to the topic's inclusion in the Commission's programme of work and that, were that understanding to be reopened, there would be no basis for continuing work on the topic.

Mr. Murphy, expressing support for Sir Michael Wood's remarks, said that the first sentence proposed by Mr. Tladi suggested that the Commission had taken a view on the concepts in question. To avoid such an interpretation, he suggested that the words "in no way reflects the Commission's view of the legal status" in that proposal should be changed to "in no way indicates a view as to the legal status". It would be acceptable to him to reword the beginning of Mr. Tladi's second proposed sentence as Mr. Jalloh had suggested.

Mr. Nolte, supported by **Mr. Vázquez-Bermúdez**, proposed that the word "concepts" in the text proposed by Mr. Tladi should be altered to "concepts and principles".

Mr. Tladi said that his choice of term had been deliberate; while he believed the concepts referred to were indeed principles, he had sought to avoid debate on that point.

Mr. Murase (Special Rapporteur) proposed the alternative term "questions", which would be in line with the wording of draft guideline 2 (2).

Mr. Nolte said that the proposal by the Special Rapporteur went in the right direction. The Commission should try to find a general term, such as "questions" or "aspects", that did not prejudge the normative character of the matters concerned. Even the word "concepts" had certain legal implications.

Mr. Murphy said that he supported the Special Rapporteur's proposal.

The Chair said he took it that the Commission agreed to insert Mr. Tladi's two proposed sentences, as further amended by Mr. Jalloh, Mr. Murphy and Mr. Murase, at the end of paragraph (6).

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Nguyen said that he wished to draw attention to a discrepancy between the fourth sentence of paragraph (7), which referred to article 1 of the Convention on International Civil Aviation, and the text of footnote 66, which was placed at the end of that sentence but mentioned only article 2 (2) of the United Nations Convention on the Law of the Sea. He suggested that a reference to article 1 of the Convention on International Civil Aviation should be added at the beginning of the footnote.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Mr. Park said that it would be preferable for the scientific information contained in the first two sentences of paragraph (8) to be moved to the footnotes; it could be merged with existing footnote 67, for example. Although the Commission had adopted paragraph (3) of the commentary to draft guideline 1, which contained a substantial amount of scientific material, the current paragraph (8) seemed to follow a slightly different approach from that taken in the above-mentioned paragraph (3).

Mr. Murase, recalling that the Commission had debated the issue at some length in 2015 and that requests had also been made for background information to be included in the commentaries during discussion of the draft text in the Sixth Committee, said that he could not accept Mr. Park's suggestion.

Paragraph (8) was adopted.

Paragraph (9)

Paragraph (9) was adopted.

The commentary to draft guideline 2 as a whole, as amended, was adopted.

Commentary to draft guideline 3 (Obligation to protect the atmosphere)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Mr. Tladi suggested that paragraph (4) should be deleted entirely, as it gave the impression that the Commission was uncertain of its position; moreover, the connection between the paragraph and draft guideline 3 was not obvious, and no authority was cited for the two views expressed therein.

Mr. Murase (Special Rapporteur) said that the paragraph was a balanced text, taking into account the views expressed during extensive discussion of obligations *erga omnes* in 2016, and should be retained. If necessary, it could be revised during the second reading of the commentary.

Paragraph (4) was adopted.

Paragraph (5)

Ms. Oral said that the definition of due diligence given in paragraph (5) was not fully aligned with existing case law, in particular the standard set in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. She suggested that the fourth sentence of the paragraph should be replaced with the following text: "Due diligence is an obligation that requires the State to adopt appropriate rules and measures, and to exercise also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private entities (operators). It also requires taking into account the context and evolving standards of both regulation and technology." The last

sentence of the paragraph would then be deleted, having essentially been incorporated into the new text.

Mr. Rajput said that the legal principle of due di'igence was well described in the paragraph but that further relevant citations in a footnote would be useful. They could include reference to paragraphs (7) to (18) of the commentary to article 3 of the Commission's 2001 articles on prevention of transboundary harm from hazardous activities, the International Law Association's 2016 resolution on due diligence in international law, *Pulp Mills*, the *Corfu Channel* case and the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*.

Mr. Murase (Special Rapporteur), welcoming both suggestions, said that reference might also be made to the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, which had been discussed in his third report.

Mr. Rajput said that, while he liked the second sentence proposed by Ms. Oral, he had some concerns regarding the first.

The Chair said that Ms. Oral's proposal should be circulated informally in writing before the Commission discussed it further.

Mr. Murphy said that he would also like to the see the written text of the footnote that Mr. Rajput had proposed.

The Chair said he took it that the Commission wished to leave paragraph (5) in abeyance and to request the Secretariat to circulate the proposed amendments informally in writing in order to facilitate the Commission's work.

It was so decided.

Paragraph (6)

Mr. Murase (Special Rapporteur) said that Mr. Tladi had suggested that a new footnote should be added to the end of the last sentence, which currently stated that the phrase "prevent, reduce or control" drew upon formulations contained in the United Nations Convention on the Law of the Sea and the United Nations Framework Convention on Climate Change. He had consulted the United Nations Framework Convention on Climate Change, but the exact words "prevent, reduce or control" did not appear in that instrument. For that reason, he proposed that the last sentence should end with the reference to the United Nations Convention on the Law of the Sea and that footnote 74 should be supplemented with a new sentence that read: "The United Nations Framework Convention on Climate Change has a similar provision in article 3, paragraph 3, which reads: 'The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.'"

The Chair said that it would be preferable to retain a reference to the United Nations Framework Convention on Climate Change in the body of the text. The Special Rapporteur and the Secretariat could amend the text as appropriate to ensure that the characterization of the language of that instrument was accurate.

Paragraph (6) was adopted on that understanding.

Paragraph (7)

Paragraph (7) was adopted.

Commentary to draft guideline 4 (Environmental impact assessment)

Paragraph (1)

Mr. Tladi said that, in his view, there was a qualitative difference between the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* and that concerning *Pulp Mills on the River Uruguay* in terms of the recognition of environmental impact assessments. He proposed that the text that followed footnote marker 84 should be replaced with three new sentences that would read:

> "In 2010, the Court in the case concerning *Pulp Mills on the River Uruguay* stated that the requirement for environmental impact assessments 'has gained so much acceptance among States that it may now be considered a requirement under general international law … where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context'. Moreover, the 2011 Seabed Disputes Chamber of the International Tribunal for the Law of the Sea advisory opinion on the *Responsibilities and Obligations of States with Respect to Activities in the Area* held that the duty to conduct an environmental impact assessment arises not only under the United Nations Convention on the Law of the Sea and its related instruments, but is also a 'general obligation under customary international law'. Similarly, the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* alluded to the importance of environmental impact assessment."

That proposal would make it necessary to rearrange the footnote markers and to ensure that the footnotes themselves contained the appropriate references.

Sir Michael Wood said that he would like to see the written text of Mr. Tladi's proposed amendment.

The Chair said he took it that the Commission wished to leave paragraph (1) in abeyance and to request the Secretariat to circulate the proposed amendment informally in writing.

It was so decided.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

Mr. Tladi proposed that, in order to ensure that the reference to the *Pulp Mills* case was relevant to the broader issue addressed in the paragraph, the last sentence should be amended to read: "In the *Pulp Mills* case, the Court indicated that the threshold for triggering the duty to conduct an environmental impact assessment was 'significant adverse impact in a transboundary context'." It would not be necessary to amend the reference in the footnote.

The Chair said that, once again, a written text would need to be circulated informally. He took it that the Commission wished to leave paragraph (4) in abeyance and to request the Secretariat to circulate the proposed amendment informally in writing.

It was so decided.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Commentary to draft guideline 5 (Sustainable utilization of the atmosphere)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft guideline 5 as a whole was adopted.

Commentary to draft guideline 6 (Equitable and reasonable utilization of the atmosphere)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to draft guideline 6 as a whole was adopted.

Commentary to draft guideline 7 (Intentional large-scale modification of the atmosphere)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

Mr. Nguyen said that the second sentence was unclear. He proposed that it should be specified in that sentence that the activities that were prohibited under the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques and Protocol I additional to the Geneva Conventions of 1949 were military in nature. In addition, he proposed that the last sentence of the paragraph should be deleted.

Mr. Murase (Special Rapporteur) said that the last sentence of the paragraph was important.

The Chair said that it was not necessary to delete the last sentence.

Mr. Vázquez-Bermúdez said that the military nature of the activities prohibited under the instruments in question was self-evident.

Mr. Park said that the last two sentences of the paragraph addressed specific concerns that Commission members had raised in the plenary and in the Drafting Committee and should not be deleted.

Sir Michael Wood said that one way of addressing Mr. Nguyen's concern would be to insert the words "those prohibited" after "such as" in the second sentence. There was no need to insert the word "military", as the type of activities prohibited under the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques was made explicit in the title of that instrument.

Mr. Ouazzani Chahdi proposed that a footnote containing examples of activities that were prohibited by international law but were not covered by the draft guidelines should be added to the paragraph.

Mr. Murphy said that the written text of the proposed footnote should be circulated informally.

Mr. Vázquez-Bermúdez said that Sir Michael Wood's proposal already addressed Mr. Nguyen's concern. There was no need for an additional footnote.

Sir Michael Wood said that the paragraph was already sufficiently clear. The existing footnotes contained references to the relevant articles of the instruments mentioned in the body text.

Mr. Ouazzani Chahdi said that he withdrew his proposal.

Paragraph (5), as amended by Sir Michael Wood, was adopted.

Paragraphs (6) to (12)

Paragraphs (6) to (12) were adopted.

The commentary to draft guideline 7 as a whole, as amended, was adopted.

Commentary to draft guideline 8 [5] (International cooperation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Tladi said that the inclusion of the words "flexibility and latitude" in the second sentence might give the impression that it was for individual States to determine the extent of their obligation to cooperate. He proposed that the sentence should be amended to read: "The phrase 'as appropriate' implies that the precise scope and application of the duty will depend on each particular circumstance."

Sir Michael Wood suggested that the deletion of the words "and latitude" might be a simpler way of addressing Mr. Tladi's concern.

Mr. Murase (Special Rapporteur) said that he accepted Sir Michael Wood's suggestion. It was explained in the following sentence of the paragraph that, depending on the situation, such cooperation could vary in terms of the form that it took.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (6)

Paragraphs (3) to (6) were adopted.

Paragraph (7)

Mr. Nolte proposed that it should be specified in footnote 119 that the draft articles on protection of persons in the event of disasters had been adopted on second reading.

Paragraph (7) was adopted, with an amendment to footnote 119.

Paragraphs (8) to (13)

Paragraphs (8) to (13) were adopted.

The commentary to draft guideline 8 [5] as a whole, as amended, was adopted.

Commentary to draft guideline 9 (Interrelationship among relevant rules)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Sir Michael Wood said that the last sentence was unclear and could perhaps be deleted, unless it was a really important statement.

Mr. Nolte proposed that, in order to make that sentence clearer, the clause "identification of customary international law itself is considered a prerequisite" could perhaps be replaced with "caution is required when identifying customary international law".

Mr. Murase (Special Rapporteur) said that the use of the word "identified" in paragraph 1 of the draft guideline had been questioned in the Drafting Committee. Paragraph (3) was therefore intended to explain the meaning of that word in relation to the

interpretation and application of rules of treaty law or customary international law. The point of the final sentence was to indicate that, before interpreting rules of customary international law, those rules must be identified. It was important to make that point and, therefore, to retain the second sentence.

Sir Michael Wood asked whether it would be acceptable to include a footnote reference to the draft conclusions on identification of customary international law.

The Chair said that it was probably not necessary to include such a reference.

Paragraph (3), as amended by Mr. Nolte, was adopted.

Paragraphs (4) to (17)

Paragraphs (4) to (17) were adopted.

The commentary to draft guideline 9 as a whole, as amended, was adopted.

Commentary to draft guideline 10 (Implementation)

Paragraph (1)

Mr. Nolte said that the meaning of the second sentence was unclear and could perhaps be deleted or else redrafted in order to clarify it. If it was deleted, he proposed the addition of a sentence at the end of the paragraph that would read: "Such measures may be designated by different terms in different agreements."

Mr. Murase (Special Rapporteur) said that the original second sentence had included the words "and compliance" after the word "implementation"; however, since the subject of paragraph (1) was implementation, it had been suggested that the word "compliance" should be deleted. A parallel sentence, which referred to the word "compliance", had been included in paragraph (1) of the commentary to draft guideline 11. He suggested that the sentence under consideration should revert to its original formulation.

Mr. Rajput said that he was in favour of retaining the current formulation of the sentence. In any case, in the third sentence, a description was given of the meaning that the Commission intended to assign to the word "implementation" in the current context.

Mr. Nolte said that, if the word "use" in the second sentence was replaced with the word "meaning", then the sentence would be easier to understand.

Mr. Murase said that he did not see much difference between the words "use" and "meaning" in that context and could accept either one. He agreed with the addition of the sentence proposed by Mr. Nolte at the end of the paragraph.

Mr. Šturma, supported by **Mr. Murphy** and **Mr. Jalloh**, said that he was not sure that the term "compliance" should be inserted in paragraph (1), since the issue would be dealt with in the commentary to draft guideline 11.

Mr. Park proposed the deletion of the second sentence because it created confusion.

Mr. Murase (Special Rapporteur) said that he could agree to the deletion of the second sentence from paragraph (1), but suggested that it should be transposed to the beginning of footnote 165.

Mr. Ruda Santolaria said that it was unnecessary to move the second sentence to footnote 165 since, even with its deletion from paragraph (1), it was clear from the remainder of the paragraph what was meant by the term "implementation".

Mr. Murase (Special Rapporteur) said that the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987, which had established an implementation committee that oversaw compliance with the Protocol, was one example in which the terms "implementation" and "compliance" had been confused. For that reason, he considered it necessary to include a statement along the lines of the second sentence.

The Chair said that, since the Commission had taken the trouble to draft two guidelines with separate commentaries, one on implementation and one on compliance, it obviously assumed that they referred to different concepts. Paragraph (1) of the commentary to draft guideline 11 indicated that draft guideline 11 complemented draft guideline 10 on national implementation and referred to compliance at the level of international law. A reference to the terms "implementation and compliance" in a draft guideline on implementation would be more confusing than enlightening to readers.

Mr. Jalloh said that a review of paragraph 11 of the Special Rapporteur's fifth report (A/CN.4/711) spelled out the distinction between the two terms very clearly; it was therefore best not to include both in the current paragraph so as to maintain the parallelism between the wording of draft guidelines 10 and 11.

Mr. Murase (Special Rapporteur) suggested an alternative to the second sentence that would read: "The term 'implementation' is sometimes confused with 'compliance' in agreements and literature."

Sir Michael Wood proposed that, for the sake of clarity, the word "national" should be inserted before the word "implementation" in the first sentence and that a new second sentence could be inserted that would read: "Compliance at the international level is the subject of draft guideline 11." A new paragraph (2) would then follow with the remaining sentences of paragraph (1).

Paragraph (1), as amended by Sir Michael Wood, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Park proposed the deletion of the words "and intrinsic" from the final sentence.

Mr. Nolte proposed that, in the final sentence, the word "should" was inappropriate since the sentence referred to obligations. He therefore proposed the replacement of the phrase "should faithfully be implemented" with "need to be faithfully implemented".

Mr. Rajput proposed that, in the first sentence, the word "certain" should be replaced with the word "relevant".

Paragraph 3, as amended, was adopted.

Paragraph (4)

Mr. Rajput proposed, first, that the third and fourth sentences should be deleted and that the entire contents of paragraph (6) should be brought up to replace those two sentences. Secondly, he proposed that the final sentence should be redrafted to read: "This includes implementation undertaken by regional organizations such as the European Union". Lastly, he proposed to retain footnote 168.

Mr. Nolte suggested that, in the first sentence, the word "may" should be deleted, because in some cases the parties must take measures. If the third sentence was retained, the words "as such" should be deleted, because they did not add anything. As, like Mr. Rajput, he found the final sentence rather complicated, he proposed recasting it to read: "This also applies to obligations of regional organizations such as the European Union".

Sir Michael Wood said that, in the first sentence, the formulation "at the national level" would be better than "at their national level". In the second sentence, it was not necessarily accurate to say that forms of implementation were regulated by the national constitution of each State, because that was not the case in some States. Although it would be more accurate to say that forms of implementation were "governed by the national law of each State", the second sentence could be deleted and paragraphs (4) and (6) combined in order to avoid repetition.

Mr. Petrič said that he could not agree to the deletion, in the first sentence, of the word "may" if paragraphs (4) and (6) were combined.

Mr. Rajput said that he did not agree with Sir Michael Wood's proposed new wording for the second sentence, as many countries had a written constitution which did regulate implementation. He could understand that the reference to "all these forms of implementation", without any further explanation, made the location of the sentence problematic. As the sentence was, however, important in the context of national implementation, he proposed that it should be moved to the end of paragraph (6).

Mr. Ruda Santolaria said that, while it was essential to retain a reference to the constitution and the national legal system, he concurred with Sir Michael Wood that the implementation of international agreements was not directly regulated by the national constitution. Perhaps the idea could be saved by referring, in the first sentence, to the measures which States might take to make international agreements operative in accordance with their constitution and their national legal system.

The Chair invited Mr. Rajput and the Special Rapporteur to draft a text for submission at the following meeting. He took it that the Commission therefore wished to leave that paragraph in abeyance.

It was so decided.

Paragraph (5)

Mr. Nolte said that, in the second sentence, it would be appropriate to insert the words "as such" after "not". The meaning of the last sentence would be made clearer by replacing "are not comprehensive of" with "are not dealing comprehensively with".

The Chair said he understood that the Special Rapporteur agreed to those amendments.

It was so decided.

Sir Michael Wood asked whether, in the first sentence, it was necessary to state that the use of the term "obligations" was not intended to impose new obligations on States or create new obligations for them. Surely, it would be sufficient to say that it was not intended to impose new obligations on States.

Mr. Park recalled that, when the Chair of the Drafting Committee had presented his report, he had said that the Special Rapporteur had explained that the provision did not impose or create new obligations on States; rather, it referred to existing obligations under international law.

Mr. Murphy said that, in the light of that explanation, the best solution would be to delete the phrase "new obligations on States", so that the sentence would read "is not intended to impose or create obligations for States".

Sir Michael Wood said that, in defence of the Chair of the Drafting Committee, the latter was only quoting the Special Rapporteur on that point. The amendment suggested by Mr. Murphy was not English. Obligations could not be imposed for States, they could be imposed on States. He failed to see the difference between imposing obligations on States and creating new obligations for States.

Mr. Nolte said that he agreed with Sir Michael Wood that the Commission should be careful about the way it used the very strong word "impose".

Mr. Murphy said that it was quite clear that the Commission was not intending to impose obligations on States by virtue of the draft guideline, nor was it creating new obligations for them. He therefore proposed the reformulation "intended to impose obligations on States or to create new obligations for them".

Mr. Jalloh (Chair of the Drafting Committee) said that the amendment proposed by Mr. Nolte which included the words "as such" closely tracked the language used in the

report of the Chair of the Drafting Committee. The Committee had not tried to suggest that the draft guidelines would create new obligations, but at the same time it had not wanted to touch on obligations that might already exist for certain States. For that reason, he was happy with the amendments suggested by Sir Michael Wood and Mr. Nolte.

Mr. Nolte, addressing a more general point, said that, like Sir Michael Wood, he failed to see the difference between creating a new obligation and imposing an obligation. The Commission could not create new obligations for States, but it could point to existing obligations. The term "impose" might give rise to misunderstandings; the expression "create" was sufficient.

Sir Michael Wood said that, as the sense of the phrase was clear because of what followed, the sentence could be simplified by saying: "The use of the term 'obligations' in paragraph 1 does not refer to new obligations, but rather refers to existing obligations that States already have."

Mr. Murase (Special Rapporteur) said that he agreed with the amendment proposed by Sir Michael Wood.

Paragraph (5), as amended by Mr. Nolte and Sir Michael Wood, was adopted.

Paragraph (6)

Mr. Murase (Special Rapporteur) said that he would consult with Mr. Rajput on how best to combine paragraphs (4) and (6).

The Chair said that he took it that the Commission therefore wished to hold paragraph (6) in abeyance.

It was so decided.

Paragraph (7)

Sir Michael Wood, supported by **Mr. Murphy**, said that, in the last sentence, it was rather odd to state that paragraph 2 "requires" that States should endeavour to give effect to the recommendations contained in the draft guidelines. It would be more apt to say that paragraph 2 "provides" that States should endeavour.

Mr. Rajput, supported by **Mr. Murphy**, suggested the deletion of the phrase "although not entirely felicitous" because it was superfluous in that context and seemed to cast doubts on the Commission's choice of language.

Mr. Nolte said that, in the second sentence, the phrase "in their formulation" was unnecessary. The sentence could end after the word "should" and the new sentence which followed could read: "This is without prejudice to any normative content which any of the draft guidelines may have under international law."

Paragraph (7) was adopted with those amendments.

Paragraph (8)

Mr. Park said that the Drafting Committee and the members who had spoken in the debate in the plenary had been against any mention of State responsibility in the draft guidelines. The Drafting Committee had taken the view that the paragraph in question was unnecessary for the purposes of the draft guideline and that, even if it were framed as a "without prejudice" clause, it would unbalance the text of the draft guidelines and would not do justice to a subject that the Commission had taken many years to complete. He therefore wondered if it was appropriate to include the Special Rapporteur's original proposal in footnote 170; he suggested that paragraph (8) should be deleted in its entirety, along with footnote 170.

Sir Michael Wood said that it would be a good idea to retain the paragraph subject to a number of amendments. In the first sentence, the phrase "the subject of" could be

deleted. In footnote 170, the actual text of the proposal should be deleted, to leave only the reference to the Special Rapporteur's fifth report. The second sentence should be amended to read: "In the main, it was considered that the secondary rules of responsibility were a subject that the Commission had already dealt with, adopting in 2001 the articles on responsibility of States for internationally wrongful acts." In addition, the following sentence should be reformulated to read: "Those articles are equally applicable in relation to environmental matters, including protection of the atmosphere from atmospheric pollution and atmospheric degradation." It was a fact that the articles on State responsibility applied to all areas of international law, apart from those governed by *lex specialis*. The remainder of the paragraph should be deleted, because it was redundant.

Mr. Murphy said that he fully agreed with Mr. Park and agreed in part with Sir Michael Wood. The paragraph largely concerned background information which would not normally be included in commentary. The last part of the paragraph was particularly problematic.

Mr. Jalloh (Chair of the Drafting Committee) said that his report had indicated that, although the Special Rapporteur's proposal regarding State responsibility had been deleted in the light of the debate, it would be dealt with in the commentary. He agreed with the amendments proposed by Sir Michael Wood.

Mr. Petrič said that he was in favour of Sir Michael Wood's proposal, because paragraph (8), like paragraph (4) of the commentary to draft guideline 12, explained what had been accepted or not accepted by the Commission. That was a departure from previous practice, was of no interest to the reader and had no place in the commentary.

Mr. Nolte said that he supported all the amendments proposed by Sir Michael Wood, except that, in the final sentence, he would replace "matters" with "obligations".

Ms. Escobar Hernández said that she fully supported the amendments proposed by Sir Michael Wood.

Paragraph (8), as amended by Sir Michael Wood, was adopted.

Paragraph (9)

Mr. Murphy suggested the deletion of the phrase "as originally proposed by the Special Rapporteur" at the end of the first sentence, together with footnote 175.

Mr. Murase (Special Rapporteur) said that, although he agreed with the deletion of the phrase in question, footnote 175 should be retained, with the deletion of its first sentence.

Mr. Rajput, referring to footnote 174, said that the *Trail Smelter* arbitration did not relate to the extraterritorial application of national law but solely to extraterritorial harm. The reference to it should therefore be dropped, but the references to other examples of case law should be retained.

Mr. Murase (Special Rapporteur) said that he agreed with that amendment to footnote 174.

Paragraph (9) as amended and with the amendments to footnotes 174 and 175, was adopted.

The meeting rose at 6.05 p.m.